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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondents, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH Respondent/Intervenors.	**RESPONDENT ALTON COAL DEVELOPMENT, LLC'S MOTION AND MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT** Docket No. 2009-005 Cause No. C/025/0005

Alton Coal Development, LLC ("**Alton**" or "**ACD**"), the permittee of Mine Permit No. C/025/0005 ("**Permit**"), through its attorneys, and pursuant to Utah Administrative Code R641-105-300 and Utah Code § 63G-4-102(4)(b), hereby renews its motion for partial summary

decision on claims raised by petitioners Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Park Conservation Association (collectively, "**Petitioners**") in their Request for Agency Action, filed with the Board of Oil, Gas and Mining ("**Board**") on November 18, 2009.

Petitioners' Request for Agency Action disputes the Utah Division of Oil Gas and Mining's (the "**Division's or "UDOGM's"**) decision to approve a permit application filed by Alton to conduct a surface coal mining operation in the Alton coal field (the "**Application**"). Petitioners have set forth objections that do not present any genuine issue of material fact requiring an evidentiary hearing, are without legal merit, and should be dismissed as a matter of law. As a result, Alton moves for summary decision and requests that the Board dismiss all claims raised by the Petitioners (1) that the permit application is deficient in its description or analysis of cultural resources; and (2) that the Division erred in approving Alton's permit application before the Utah Division of Air Quality had approved a separate Air Quality Permit.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Alton is the owner of the Coal Hollow Mine, and permittee of Mine Permit No. C/025/0005. (Permit C/025/0005. (**Exhibit A**, at 1.)

2. Alton proposes to develop and operate a surface coal mine which will produce approximately 2,000,000 tons of coal annually, initially from private lands (the "**Coal Hollow Mining Project**"). (Permit Administrative Overview). (**Exhibit B** at 1.)

3. The Alton permit area comprises approximately 635.64 acres in Sections 19, 20, 29 and 30, Township 39 South, Range 5 West, SLM, Kane County, Utah. (Exhibit A, at 1-2).

No publicly-owned surface or mineral property is involved in the project. (Final Technical Analysis, at 11.) (Exhibit B at 1.)

4. Alton has applied to lease certain federal coal reserves pursuant to a competitive Lease by Application ("**LBA**") pending before the Bureau of Land Management ("**BLM**"). The LBA is not included within the permit area of the approved Application. (Exhibit B at 1.)

5. Alton submitted the Application to the Division for approval of the permit on June 14, 2007. The Division initially deemed the Application incomplete on August 27, 2007. (Permitting Chronology, State Decision Document and Application Approval, October 15, 2009). (**Exhibit C.**)

6. Alton provided supplemental information to the Division, on January 24, 2008. Id.

7. On March 14, 2008 the Division determined the Application administratively complete. Id.

8. A period of public notification occurred from March 26, 2008 to April 16, 2008. On May 16, 2008 the public comment period ended and an informal conference was held on June 16, 2008 in Alton, Utah. Id.

9. In response to the public comment and input from other agencies, Alton provided additional information to the Division on December 22, 2008, August 17, 2009, October 8, 2009, and October 14, 2009. Id.

10. The Division approved the Application by State Decision Document and Application Approval dated October 15, 2009. This document includes a Technical Analysis dated October 15, 2009 (the "**Final TA**"), Findings as required by R645-300-131.114 dated

October 15, 2009 ("**Findings**"), Administrative Overview and Recommendations for Approval, Permitting Chronology, Proposed Permit, Location Map, Determination of Completeness, Publication Notices, the Cumulative Hydrologic Impact Assessment ("**CHIA**") dated October 15, 2009, the Applicant Violator System ("**AVS**") Recommendation dated October 15, 2009 and Insurance Certificate.

11. By letter dated October 19, 2009 the Division notified the Permittee of the Application approval. (See Letter from Division Director John R. Baza to Chris McCourt, Alton Manager. (**Exhibit D.**)

12. Petitioners filed a Request for Agency Action to appeal the approval of the Application on November 18, 2009. Proceedings before the Board commenced on December 9, 2009.

13. The Division found that the "[c]oal mining and reclamation operations would not adversely affect any publicly owned park or any place included in the National Register of Historic Places. (Final TA, p. 84.) The Division also issued a finding confirming that issuance of the Permit is in compliance with the National Historic Preservation Act and implementing regulations (Findings, ¶ 6.) (**Exhibit E.**)

14. Alton commissioned cultural resources surveys of the permit area and surrounding lands, covering 3,977 acres in and around the permit area. (CRMP p. 17.) (**Exhibit F.**)

15. From among sites identified by the surveys, the Division identified sites that would be affected by the proposed mining operations, and sought the concurrence of the State Historic Preservation Officer. (**Exhibit G,** Ltr. 2).

16. The State Historic Preservation Officer ("SHPO") concurred with the Division's determinations regarding whether the sites would be affected, and whether the sites would be eligible for listing on the National Register of Historic Sites. **(Exhibit H)**

17. The SHPO also concurred on the remaining sites located outside the permit area. (#21 in 2007 incoming file.) **(Exhibit I**, Email.)

18. The PNHD is not within the Coal Hollow Mine permit boundaries, nor within any adjacent area of the Permit. (Permit, at 1-2.)

19. The PNHD is located approximately 20-30 miles from the permit site where operations will take place. (Cultural Resource Management Plan, Excerpt.) **(Exhibit F**, at 5.)

20. The PNHD shares no common boundary with the Coal Hollow Mine Permit Area.

21. The PNHD is traversed by U.S. Highway 89.

22. U.S. Highway 89 is a public road. Pursuant to Utah Admin. Code R641-108-204, Alton requests that the Board take official notice of this fact.

23. Highway 89, as part of the state transportation system, is under the jurisdiction of the Utah Department of Transportation. Utah Code § 72-1-201.

24. A potential route for trucks transporting coal from the Coal Hollow Mine to buyers includes U.S. Highway 89 through Panguitch. **(Exhibit F.)**

25. Alton included a Fugitive Dust Control Plan in its Application, which specifies the use of EPA Method 9 in its monitoring program. (Application, at Appx. 4-5; Final TA at 87.) **(Exhibit J.)**

26. On October 13, 2009 a representative of the Division, Priscilla Burton, sent an email to Jon Black from the Utah Department of Air Quality ("**DAQ**") in which she stated that:

> "Method 9 is being proposed for monitoring of the fugitive dust control plan. [The Division] does not have the expertise to evaluate the use of method 9. Your comment that EPA Method 9 is occasionally used for fugitive control monitoring of sand and gravel operations has been helpful. I am hopeful that DOGM will coordinate the permitting and compliance of this control plan with DAQ in the future."

(October 13, 2009, Exhibit K, Email.)

27. The Division issued a finding confirming that Alton submitted a Fugitive Dust Control Plan to the Division and recommending that the Utah DAQ evaluate this plan and EPA Method 9 prior to issuance of the air quality permit for the Coal Hollow Mine. (Final TA at pp. 86-87.)

28. The Division found that the Air Pollution Control Plan submitted by ACD would control fugitive dust emissions by "stabiliz[ing] exposed surface areas . . . minimize[ing] and control[ling] erosion of regarded areas . . . and control[ling] sediment contributions to streams from stockpiles using tackifier or surface roughening, mulch, and vegetation . . . ." Final TA at 85.

29. The permit is conditioned upon Alton's receipt of an Air Quality Approval Order from DAQ prior to conducting surface mining. (Permit, Attachment A, Special Conditions.)

30. In the March 26, 2009 Technical Analysis, the Division identified issues concerning the Coal Hollow Mining Project's effect on "night sky" clarity and seeking additional information (March 26, 2009 Technical Analysis at 83.) Alton responded to "night sky" issues identified by the Division in a memorandum provided to the Division in June, 2009, concluding that the Division did not have the authority to require information on "night sky" issues. (See Exhibit 3 to June 15, 2009 Initial Response to Division Technical Analysis.) (Exhibit L.)

31. The Respondents filed motions to dismiss certain of Petitioner's claims and those motions were argued before the Board on January 27, 2010. The Board issued its Order Concerning Motion to Dismiss on February 18, 2010 ("**Order**").

32. Since issuance of the Board's Order, the parties have completed discovery on the issues which were previously raised by Respondent's Motions to Dismiss.

33. Petitioners filed issue statements attached to the Board's Scheduling Order dated April 7, 2010. Petitioners have dropped their claim relating to Sage Grouse Protection and Narrowed their Request to the issues set forth therein.

STANDARD FOR SUMMARY JUDGMENT

In a formal adjudication under the Utah Administrative Procedures Act ("UAPA"), the presiding officer(s) may dispose of a matter by summary judgment as that standard is set forth in the Utah Rules of Civil Procedure. Utah Code § 63G-4-102(4)(b) (LexisNexis 2009); see Utah Admin. Code R641-100-500 (2009) (reserving all powers in UAPA to the Board).

The Board has previously been briefed on and heard arguments concerning the issues raised in this Motion for Partial Summary Judgment on the standard governing a Rule 12(b)(6) Motion to Dismiss. That standard required the Board to "accept the factual allegations of the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff." February 18, 2010 Order, at p.3 FN 1 (citing *Ho v. Jim's Enterprises, Inc.*, 2001 UT 63, ¶ 6, 29 P.3d 633). As such, the Board limited its Rule 12(b)(6) inquiry to the pleadings and read the claims made by Petitioners' in their Request for Agency Action broadly and in the best possible light. See Order at 10. No such reading is required for a motion for summary judgment. Instead, the Board may consider matters beyond the pleadings

and summary judgment shall be rendered when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). Indeed, a party opposing summary judgment may not rest on mere allegations or denials, but must provide affirmative proof in the form of affidavits or other actual evidence setting forth specific facts showing that there is a genuine issue to be resolved at trial. Id. at 56(e).

Subsequent to the Board's February 18, 2010 decision on the Motions to Dismiss filed by both the Division and Alton, the Petitioners have had the opportunity to conduct additional discovery. The Petitioners have, through the application and permitting process, and through this administrative proceeding, been afforded ample opportunity to ascertain, adduce, and set forth evidence supporting their claims. Alton now brings these issues again before the Board, to be adjudicated on the summary judgment standard. As Alton will demonstrate herein, summary judgment is merited because the Petitioners have not, and indeed cannot, bring forth any evidence that would create a genuine issue as to any material fact. An evidentiary hearing is not required to resolve these issues and the Board should enter an order dismissing the claims.

Petitioners are incorrect that their right under UAPA and the Board's rules to present evidence precludes determining these issues by summary decision. Alton acknowledges that Petitioners are entitled to present evidence to the Board in support of their claims of error in the Permit approval. Indeed, it is Petitioners' burden to do so, and they cannot prevail on any claim without producing evidence to meet their burden of proof. This is exactly the reason for Alton's motion for summary decision—to demand that Petitioners bring forward whatever evidence they possess in support of their claims. Alton will explain below that based on facts known to Alton, apparent in the record, and believed to be undisputed, the Board should decide that no provision

governing the Utah Coal Program has been violated. If petitioners know of facts to the contrary, their response to this motion is both their opportunity and duty to produce evidence of those facts. Once Petitioners have been afforded the opportunity to produce evidence opposing this motion, no provision of Utah law prevents the Board from making its decision in this matter without another, redundant opportunity to produce that evidence in a separate evidentiary hearing. Indeed, as a matter of law, Petitioners fail in their burden of proof if, in repose to this motion, they rely on mere allegations or denials and fail to bring forward evidence showing that genuine issues of material fact exist for the Board to decide.

Petitioners' right to present evidence in support of their claims does not extend to presenting evidence that is irrelevant or immaterial. See Utah Admin. Code R641-108-201; Utah Code § 63G-4-206(1)(b)(i). If the existence of the facts sought to be proved will have no bearing on disposition of a claim, the fact is irrelevant and a party to a proceeding before the Board is not entitled to present it through exhibits or testimony. This is the case with the Petitioners' claims discussed in this motion and memorandum. For the reasons just discussed, Petitioners are obliged at this juncture to bring forth evidence in support of their claims, and cannot complain that adjudication of the issue on summary decision denies them a right to present evidence that is immaterial to resolving the issue.

ARGUMENT

I. THE BOARD SHOULD DISMISS PETITIONERS' CLAIMS THAT THE APPLICATION'S CULTURAL/HISTORIC RESOURCE INFORMATION WAS DEFICIENT.

The Board should dismiss all four of Petitioners' claims that Alton's application was deficient because it did not include adequate cultural/historic resource information.[1] The Petitioners cite to Rule 645-301-411.140 of the Utah Administrative Code, which provides:

> Cultural and Historic Resources Information. The application will contain maps as described under R645-301-411.141 and a supporting narrative which describe the nature of cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas. The description will be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historic, and cultural preservation agencies.

Request at 24 (citing U.A.C. R645-301-411.140 (emphasis added)).

However, the Division has specifically found the cultural resource information provided in the Application adequate to meet the requirements of R-645-301-411. (Final TA at p. 26.) Further, the Division has found that Alton's operations will not adversely affect any place included in the National Register of Historic Places. (Final TA at p. 84.) The Division also

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[1] Specifically, in preparation for upcoming hearing, Petitioners state they are bringing four claims relating to the above Rule R645-301-411.140 concerning cultural/historical resources. These four claims are:
(1) Whether the Division's determination of eligibility and effect related to cultural and historic resources covered the entire permit area approved for the Coal Hollow Mine;
(2) Whether the Division's determination of eligibility and effect related to cultural resources covered any area outside the permit area approved for the Coal Hollow Mine;
(3) Whether the Division considered a mitigation plan for any cultural or historic resources located wholly outside the permit area; and
(4) Whether the Division was required to identify and address the effect of the proposed Coal Hollow Mine on the Panguitch National Historic district before approving the mine permit.
See Scheduling Order, Docket No. 2009-015 (Apr. 7, 2010). (The order incorrectly states the Docket Number to be 2009-005.) **(Exhibit M.)**

found issuance of the permit to be in compliance with the National Historic Preservation Act and implementing regulations. (Findings, ¶ 6.) Despite these findings and despite acknowledging that Alton filed a Cultural Resource Management Plan (the "**CRMP**"), Petitioners now seek to adjudicate whether UDOGM's made all of the determinations it was required to under the rules governing cultural resources in and near the mining operation.

The Board has already heard the parties' arguments on Petitioners' contention regarding the Panguitch National Historic District ("**PNHD**"). Specifically, Petitioners ask the Board to determine whether the Division was required to identify and address the effect of the proposed Coal Hollow Mine on the PNHD before approving the mine permit. Scheduling Order, Docket No. 2009-015 (April 7, 2010.) In its February 18, 2008 Order, the Board observed that Petitioners' arguments concerning the alleged failure of the Division to consider impacts on the PNHD are "problematic and somewhat unclear." (Order, at 5.) Specifically, it stated that it viewed the Petitioners' arguments that the PNHD should be characterized as part of the "adjacent area" to the "permit area" as "deeply flawed." (Order, at 9.) However, while the Board "struggle[d] to see what evidence Petitioner might offer to demonstrate that the PNHD, some 20-30 miles removed from the permit area, should be considered an 'adjacent area' under the coal regulations," it concluded that it was precluded from granting Alton's Motion to Dismiss by "the liberality of Rule 12(b)(6)" and references to matters outside the pleadings. On a motion for summary judgment, the Board can look beyond the pleadings to evidence in the record, which will demonstrate that there are no genuine issues of material fact and that Petitioners' claims can be dismissed as a matter of law.

A. No Analysis of the Effects of the Proposed Mine on the PNHD Was Required Because the PNHD is Not Located Within the Permit Area or the Adjacent Area.

In cultural issue number 4, Petitioners ask the Board to consider "Whether the Division was required to identify and address the effect of the proposed Coal Hollow Mine in the PNHD before approving the Mine Permit." Petitioners' contention here is that possible truck traffic proceeding from the Mine through, PNHD – along U.S. Highway 89 – requires additional material to be added to the CRMP.

The Application was not required to contain a detailed analysis of effects on the PNHD, because the PNHD is not located within the "permit area" or the "adjacent area." As a matter of law, this claim must fail, because there is no genuine dispute as to a material fact as to whether the PNHD is located within the Permit or "adjacent area", and, as a result, the PNHD lies well beyond the purview of the requirements contained in U.A.C. R645-301-411.140. Analysis of the PNHD in either the CRMP or the Permit Application is not a requirement of the Utah Coal Program or the federal Surface Mining Control and Reclamation Act ("**SMCRA**").

There can be no genuine dispute that the PNHD (and U.S. Highway 89) are located outside of the Permit Area and Adjacent Area. (See Permit, 1-2.) First, the "permit area" is the area that must be covered by the operators' reclamation performance bond, and corresponds generally to the area where the surface of the land will be disturbed by mining operations. R645-100-200. As Figure 3 of the CRMP makes clear, the PNHD is roughly 20-30 miles from the Coal Hollow Mine permit site where operations will take place. Moreover, no part of PNHD or U.S. Highway 89 is included in the mine permit, subject to reclamation once Alton's mining operations cease, or included in the operator's reclamation bond. (Id.)

Second, the PNHD is not located within the "adjacent area." The Utah Administrative Code defines "adjacent area" as "the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations, including probable impacts from underground workings." Utah Admin. Code R645-100-200 (2009) (emphasis added).

The definition of "adjacent area" relies in turn on the definition of "coal mining and reclamation operations" as the areas upon which operations occur and includes "adjacent land, the use of which is incidental to any such use" including "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities for haulage and excavation. . . ." Id. In addition to the fact that it is 20-30 miles from the "permit area," the PNHD does not fall within the "adjacent area" as it would not be impacted by mining operations or reclamation operations, nor is U.S. Highway 89 a "haul road" to gain access to the Coal Hollow Mine.

The term "surface coal mining operations" under SMCRA parallels Utah's definition of "coal mining and reclamation operations." Cp. 30 U.S.C. § 1291(28)(B) with Utah Admin. Code R645-100-200 (2009). Both the Interior Department and a federal court have construed the federal definition to exempt public highways. See Citizens Coal Council, 142 IBLA 33 (1997) (finding that OSM properly concluded that a railroad and pipeline used to transport coal from surface coal mines to remote electrical generating stations were not "surface coal mining operations" under § 701(28)(B) of SMCRA); Harman Min. Corp. v Office of Surface Min. Reclamation and Enforcement, 659 F.Supp. 806, 811 (W.D. Va. 1987). In Harman, the federal

district court was called upon to consider whether certain public roads used to haul coal in West Virginia were excluded from permitting under SMCRA. In that case, the court commented:

> "Implicit in Congress' thinking in enacting 30 U.S.C. § 1291(28) was that generally an operator is not required to permit a public road. . . .Obviously, Congress did not anticipate that operators would have to permit interstate highways or four-lane state routes nor that they would have to permit every road used to haul coal, whether four-lane or two-lane, state or county, paved or unpaved, or even public or private." Id.

Petitioners have not provided any support for the proposition that transporting coal on a public highway located miles outside the actual mining area constitutes mining "operations" regulated by the Utah Coal Program. In the absence of any evidence they instead attempt to advance an incorrect interpretation of the definition of "operations" to include transportation over public roads located outside the permit area. This interpretation stretches the definition beyond any logical boundaries, renders the definition of "adjacent areas" virtually meaningless and produces the absurd result of including all public roads anywhere upon which coal is hauled. State v. Jeffries, 2009 UT 57, ¶ 8, 217 P.3d 265, 268 ("To avoid an absurd result, we endeavor to discover the underlying legislative intent and interpret the statute accordingly").

The Board agreed with Alton's analysis of the relevant case law in its February 18, 2010 Order, confirming that the Harman case stands for the proposition that where use of roads for access or haulage "occurred on public roads," such use fell outside of the definition of surface coal mining operations and such roads need not be permitted. (Order at 8.)

Thus, the analysis for summary judgment on this claim hinges upon whether or not the portion of US Highway 89 crossing the PNHD is a public road. There can be no genuine dispute with respect to whether or not US Highway 89 is a public road. West One Trust Co. V. Morrison, 861 P.2d 1058, 1059 (Utah Ct App. 1993) (A genuine issue of material fact exists only

"where, on the basis of the facts in the record, reasonable minds could differ."). The Board can take official notice of this fact, and Petitioners have not – and cannot – bring forth evidence to refute this fact.[2] As such, "coal transportation on US Highway 89 would not be considered a 'coal mining and reclamation operation,' would not require the road to be permitted, and would therefore not require inclusion of the PNHD within the 'adjacent area' even if the effects of that traffic might potentially be felt there." (Order at 9.)

Finally, the Petitioners cannot base any claim upon the CRMP's statement concerning the "reasonably foreseeable transportation route." The CRMP was developed as a comprehensive document to address separate state and federal regulatory requirements, including BLM's requirements under NEPA related to BLM's review of Alton's proposed lease of federal coal lands. BLM's requirements do not relate to the Mine Permit area on private lands or to the Utah Coal Program requirements for this Application.[3] The transportation route was included to help

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[2] "The Board may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence . . . ." U.A.C. R641-108-204; see also Utah R. of Evid. 201 (judicially noticed fact "must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

[3] Alton developed the CRMP, in part, in response to a special request by the State Historic Preservation Office ("**SHPO**"), but the only legal reason that the PNHD is addressed is to comply with the National Environmental Policy Act ("**NEPA**") relating to the pending federal coal lease application. The NEPA analysis is triggered by federal actions unrelated to the mine permit on private land. The CRMP explains:

> The Alton Coal Cultural Resource Management Plan (CRMP) is a new, collaborative approach to state and federal undertaking with potential affects (sic) to cultural resources in the Alton Amphitheater and Sink Valley regions. . . .

BLM analyze federal leasing requirements under the Natural Environmental Policy Act ("**NEPA.**") 42 U.S.C.A. § 4321, et. seq. NEPA requires an environmental impact statement to address the "affected environment" as to "major federal actions significantly affecting the quality of the human environment." 42 U.S.C.A. § 4332 (2)(C). As noted by the Board, the Division has clarified in oral argument that the TA commentary regarding the CRMP referred to by the Petitioners does not pertain to state regulatory requirements, "but instead to inapplicable federal mandates." (Order at 6.). The TA refutes Petitioner's allegations and is appropriately before the Board in this Motion. The Board can take official notice of "the record or other proceedings before the Board," Utah Code § 63G-4-206(1(b)(iv). The Petitioners have not been able to adduce any evidence to refute the Division's clarification. Therefore, there is no genuine issue of material fact and the Board can dismiss this issue without a need for further evidentiary hearings.

> The private and federal actions associated in the Alton Coal CRMP involve a number of state and federal agencies and must be compliant with a number of state and federal mandates. . . . All of the involved agencies . . . are aware that while the mine permit on public land and the proposed federal lease are not directly connected, these actions are related and therefore this document is a reference for UDOGM, the Utah State Historic Preservation Office (SHPO), and the Utah Public Lands Policy Coordination Office (PLPCO) for application to Utah Code 9-8-404, as well as for the BLM and UDOGM for application to Section 106 of the NRHP and NEPA."

Exhibit B at 1 (emphasis added); The CRMP further states that: "The Environmental Impact Statement (EIS) that the BLM and SWCA Environmental Consultants are preparing for the federal coal lease application describes the foreseeable transportation route through the Historic District of Panguitch as a cumulative effect." (Id. at 20.)

II. PETITIONERS CANNOT PREVAIL ON THEIR NEW CLAIMS THAT THE DIVISION FAILED TO ANALYZE EFFECTS ON CULTURAL RESOURCES IN THE PERMIT AND ADJACENT AREAS.

A. Petitioners Are Not Entitled to Adjudication of the Issue They Identify Relating to the Division's Cultural Resource Determinations Within the Permit Area Because the Issue was Not Raised in the Request for Agency Action.

Petitioners' list of issues it proposes to pursue with evidence at hearing adds new claims rather than narrowing and refining the issues. The first of these new claims – embodied in cultural issue number 1 - is characterized as:

"Whether the Division's determination of eligibility and effect related to cultural and historic resources covered the entire permit area approved for the Coal Hollow Mine." Thus, this new claim is related to the Division's determination of "eligibility and effect" for cultural resources located *within* the permit area.

In contrast with this new claim, Petitioners' Request for Agency Action only alleged deficiencies regarding cultural resources entirely *outside* the permit area, and the only specific cultural resource identified in the Request was PNHD. This expansion of claims is improper under the Board's rules of practice. Issue 1 is therefore a new claim that should not be adjudicated.

This Board's rules governing the Request for Agency Action require that the Request set forth the relief sought from the Board, and "the facts and reasons forming the basis for relief." Utah Admin. Code R641-104-133.600–133.700. Thereafter, a petitioner may amend its pleadings if it obtains the Board's permission to do so at or before the hearing. R641-104-240. Petitioners have not received the Board's permission to augment their Request to include this new issue. Because the Board has ruled that the hearing in this matter has commenced, the time

for obtaining such permission is past, and the Board should refuse to adjudicate the new claim. See Board of Oil, Gas & Mining, Minute Entry, Docket No. 2009-019 (Dec. 17, 2009) ("[T]he Board started its hearing in this matter at its regularly-scheduled December 9, 2009 meeting"). Therefore, Petitioners cannot prevail on any claim related to analysis of cultural resources located within the permit area, and cultural issue number 1 should be dismissed.

Moreover, in addition to its fatal procedural defects, claim number 2 should be dismissed as hopelessly vague, because it fails to state with any specificity exactly how the Division has been deficient in granting the permit. The determination of "eligibility and effect" refers to whether an identified cultural resource is eligible for listing on the National Register of Historic Places, and whether the proposed undertaking will likely have an adverse impact on that resource.[4] Yet, Petitioners have not identified any cultural or historic resources within the permit area that they allege to have not been adequately considered. As in Petitioners' cultural issues 2 and 3 described below, the allegation that no determination of eligibility and effect "covered" the permit area fails to address the rule's requirement to focus on adverse impacts to specific resources.

B. Petitioners Are Not Entitled to Adjudication of the Issues They Identify Relating to the Division's Cultural Resource Determinations Outside the Permit Area Because they Have Identified No Cultural Resource Site Outside the Permit Area that Will be Affected by Coal Mining and Reclamation Operations

This Board's rules for analysis of cultural resources require that the permit application identify sites listed or eligible for listing on the National Register of Historic Places if those sites

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[4] For coal mine permits, UDOGM is responsible for making this determination and obtaining the concurrence of the State Historic Preservation Officer. See Utah Code § 9-8-404

are located "within the permit or adjacent areas." Utah Admin. Code R645-301-411.140. As stated earlier, the "permit area" is the area that must be covered by the operators' reclamation performance bond, and corresponds generally to the area where the surface of the land will be disturbed by mining operations. R645-100-200. The "adjacent area" is delineated only according to the context in which it is used:

> Adjacent area means the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations, including probable impacts from underground workings.

Id. While the Division will permit an applicant to the delineate "adjacent area" on a map, it does not require this, and the applicant's delineation is nonbinding, because the location of the adjacent area is based on the likelihood of adverse impacts to a resource due to mining and reclamation operations, not on any boundary enclosing an arbitrary geographic area.

In light of this definition, Petitioners have presented an empty claim of error for the Board's consideration. The allegations that no determination of eligibility and effect, and no mitigation plan, "covered" any area outside the Permit Area (and therefore, presumably, included no adjacent area) fail to address the rule's requirement to focus on adverse impact to resources from mine operations rather than a simple acreage determination. In this context, cultural resources are sites of historic or archaeological interest, and the "adjacent area" is limited to sites adversely impacted by the mining operation itself.

To prevail on this claim in the "adjacent area", Petitioners must prove that an eligible resource exists outside the permit area under circumstances where it is likely to be adversely impacted by the proposed mining operations. Petitioners have proferred no evidence of such an eligible and affected resource located beyond the permit area, but merely allege that no separate

determinations related to eligibility and effect covered the non-permit area. Adjudication of cultural issues 2 and 3, therefore, will not address the dispositive issues in the Board's cultural resource rules. Even if both issues are determined in the affirmative, without also showing that a resource eligible for listing is likely to be adversely impacted, the Board would be unable to conclude that the permit application failed to identify and plan for protection of cultural resources in the adjacent area. The issues should therefore be dismissed.

III. THE BOARD SHOULD DISMISS PETITIONERS' CLAIMS THAT THE APPLICATION'S FUGITIVE DUST CONTROL PLAN IS DEFICIENT.

The Board should dismiss Petitioners' claims related to the Fugitive Dust Control Plan because there are no genuine issues of material fact with respect to Petitioners' claims. Petitioners' claims regarding the Fugitive Dust Control Plan must fail as a matter of law.

In its February 18, 2010 Order, the Board made clear that the Division was not required to consider impacts to the night sky. It further determined that, while it appeared there was sufficient evidence to refute the Plaintiffs' allegations that the Division had improperly failed to make a determination regarding adequate air quality monitoring program, it could not dismiss the claims because it "implicates matters outside the pleadings." (Order at 4.) Further, it made clear that the Petitioners "will bear the burden of showing that regulations pertaining to air pollution control were violated." (Id.) For the reasons explained below, the Petitioners cannot meet this burden, and thus its claims concerning air quality should be dismissed.

A. The Division Determined that Alton Submitted an Adequate Fugitive Dust Pollution Control Plan

This Board's rules for the contents of a permit application require that the applicant submit an air pollution control plan. R645-301-423. To be considered adequate, both dust monitoring and dust control elements must be present: an air quality

monitoring program that will generate data sufficient to evaluate the effectiveness of fugitive dust control practices (R645-301-423.100); and a plan for fugitive dust control that provides for stabilization of exposed surfaces and other soil stabilization practices (R645-301-423.200).

The Division found, in its final technical analysis, that both required elements were present. With respect to the dust *monitoring* plan, the TA notes that Appendix 4-5 of the PAP contains this plan, which provides for specific remedial actions based on the level of air opacity observed. With respect to the dust *control* plan, the Division concluded that the plan, also in Appendix 4-5, "will stabilize" exposed surface areas, "will minimize and control erosion" of regraded areas and stockpiles, and "will control" sediment contributions to streams. TA at 85. Nevertheless, because the Division, itself, lacked the ability to train its own inspectors in using the method planned for measuring opacity (EPA Method 9) it chose to condition the permit upon the Division of Air Quality's subsequent conclusions regarding the monitoring plan. TA at 85-86. This approach was reasonable, and the TA recognized that a Memorandum of Understanding ("**MOU**") existed between the two agencies for this purpose. TA at 86. Because this approach represents the Division's considered judgment in a technical issue, a deferential standard of review is appropriate. Under that standard, the Board should not disturb the Division's reasonable choice to condition the permit on DAQ's separate approval of an air quality permit. Summary decision on this issue should be rendered for respondents, and the claim dismissed.

B. The Division Has Properly Conditioned the Mine Permit Upon Alton's Receipt of an Air Quality Approval Order.

The Board should dismiss Petitioners' claims that Alton's air pollution control plan is deficient. (Request, at 26-27.) The first of these claims appears to be that the Division could not have found Alton's Fugitive Dust Control Plan to be adequate because the Division is not qualified to evaluate EPA Method 9 proposed by Alton's monitoring plan. However, the applicable Utah Coal Program rules do not require the Division to issue air quality permits. Rather, the application is to "contain a description of coordination and compliance efforts which have been undertaken by the applicant with the Utah Bureau of Air Quality." R645-301-422. The Division's findings confirm that the Application describes Alton's compliance with the DAQ requirements for obtaining an Air Quality Approval Order. (Final TA at 85 referring to Application, Section 422 and Appx. 4-2.) Further, the Mine Permit itself is conditioned upon Alton's receipt of the Air Quality Approval Order from DAQ. In addition, the Division's findings acknowledge that Alton has provided a plan for fugitive dust control as required by R645-30-423 at Appx. 4-5 of the Application. (Final TA at 86.) However, because the Division lacks expertise to assess EPA Method 9 under Alton's monitoring plan, the Division has properly deferred to Utah DAQ. (Final TA at 87.)

Pursuant to an MOU dated September 1, 1999, DAQ will evaluate the fugitive dust control plan prior to issuance of the air quality permit. Id. The Division's rules at R645-301-422 clearly contemplate this type of inter-agency coordination with the DAQ. The Division has conditioned the permit to require an approved Air Quality Approval Order before Alton can conduct surface coal mining operations. (Ex. A Permit, Attachment A, Special Conditions).

Therefore, Petitioners' claims that the air pollution control plan is deficient are moot and should be dismissed.

C. The Utah Coal Program Does Not Require Applicant to Address the Quality of the Night Sky.

The second of the Petitioners' claims, related to the quality of the night sky in the National Park and Forest east of the permit area, is not rooted in a statute or rule that the Division is authorized to enforce. Petitioners allege that the Division explicitly required Alton to "explain the equipment for lighting the 24 hour operation and the effect on the night sky." (Request at 27.) The Petitioners' claims related to the "night sky" issue necessarily fail, because the Division does not have authority to require such analysis. The Application applies only to the area being permitted, which is comprised entirely of private lands and private coal leases. The night sky issue was originally raised in comments submitted by the Dixie National Forest in response to Alton's pending federal coal lease application.[5] In the February 18, 2010 Order, the Board agreed with Alton that "the controlling regulations create no requirement to consider the impact of fugitive dust on night sky clarity." (Order at 4.)

In presenting their final list of issues for hearing, Petitioners' attempt to re-frame the night sky issue in terms of the Division of Air Quality's analysis of the dust control plan. The issue, however, remains unchanged. If the Division was under no legal requirement to consider

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[5] Alton Coal properly responded to the Division on this issue in a Memorandum attached as Exhibit 3 to its June 15, 2009 response to the Division's Technical Analysis. The night sky issue is being analyzed by the BLM in conjunction with the draft environmental impact statement for the federal coal lease application. Section 102(2)(C) of NEPA, 42 U.S.C. § 4321, et seq. requires an environmental analysis by federal agencies undertaking "major Federal action significantly affecting the quality of the human environment" (emphasis added). 42 U.S.C. § 4332. NEPA is not applicable to issuance of a State mine permit on private lands.

the effect of fugitive dust on the night sky, it cannot have been error to wait for the DAQ to determine effectiveness of fugitive dust monitoring methods before approving the mine permit. In summary, the "night sky" issue is only properly subject to analysis under the BLM's environmental impact statement being prepared for Alton's federal coal lease application. Because this allegation alleges no more than that the Division declined to exceed its statutory authority, Alton is entitled to summary judgment dismissing air quality issue number 5.

CONCLUSION

For the foregoing reasons, Alton's motion for partial summary judgment should be granted, and the Board enter judgment for the Respondents, and dismiss Petitioners' claims that the Application's cultural/historic resource information was deficient and that the Application's air pollution control plan is inadequate.

Respectfully submitted this 15th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONDENT ALTON COAL DEVELOPMENT, LLC'S MOTION AND MEMORANDUM IN SUPPORT OF PARTIAL SUMMARY JUDGMENT** was sent via email and U.S. Mail, postage prepaid, this 5th day of April, 2010, to the following:

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